

1 WO
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Michael F Foy, IV,

No. CV-21-02076-PHX-MTL

10 Plaintiff,

ORDER

11 v.

12 Jennifer Vinson, et al.,

13 Defendants.

14
15 **I.**

16 Plaintiff Michael Foy filed the instant action against Defendant Jennifer Vinson on
17 October 28, 2021, in Arizona Superior Court,¹ alleging a single count of defamation.
18 On December 8, 2021, Defendant removed the action to this Court. (See Doc. 1.) Shortly
19 thereafter, Defendant moved to dismiss Plaintiff's initial complaint for failure to state a
20 claim. (See Doc. 4.) Upon Plaintiff's request, the Court granted him leave to amend and
21 denied Defendant's motion to dismiss without prejudice. (Doc. 16.) Plaintiff then filed the
22 operative complaint. (Doc. 18.) Defendant again moves to dismiss the complaint in its
23 entirety. (Doc. 19.)

24
25 **II.**

26 In her motion, Defendant gives several reasons why the Court should dismiss
27 Plaintiff's defamation claim. First, the claim is barred by Arizona's one-year statute of
limitations for defamation. Plaintiff's complaint alleges that Defendant defamed him in

28
29 ¹ Plaintiff had previously filed another action against Defendant, in McDowell Mountain
Justice Court, in August 2020. That action was dismissed for failure to serve.

1 August 2020, and that Plaintiff discovered the alleged defamation that same month, yet
2 Plaintiff did not file the instant action until October 2021. Second, Plaintiff fails to
3 adequately allege that Defendant republished the allegedly defamatory remarks. Third, the
4 complaint contains no plausible allegations suggesting the limitations period was, or should
5 have been, tolled. Fourth, the exhibits to Defendant's motion to dismiss—Plaintiff's
6 complaint from the August 2020 action, images of the "Me Too Phoenix" Twitter and
7 Instagram pages, and an image of a Change.org petition allegedly circulated by
8 Defendant—may be considered by the Court without converting Defendant's motion to
9 dismiss into a motion for summary judgment because (1) the Court can take judicial
10 notice of Plaintiff's August 2020 complaint because it is a matter of public record, and
11 (2) the images of the Twitter, Instagram, and Change.org pages may be considered
12 because the contents of those pages were incorporated by reference into Plaintiff's
13 complaint.

14 Plaintiff advances several arguments in resisting Defendant's motion. First,
15 Plaintiff appears to take issue with Defendant's citation to *Bell Atlantic Corp. v.*
16 *Twombly*, 550 U.S. 544 (2007), and contends that only "notice pleading" is required to
17 survive a motion to dismiss under Rule 12(b)(6). For support, Plaintiff cites several
18 Arizona Court of Appeals decisions. *E.g., Dube v. Likins*, 216 Ariz. 406, 412 (App.
19 2007) ("[B]ecause Arizona is a notice pleading state, a complaint need only have 'a
20 statement of the ground upon which the court's jurisdiction depends, a statement of the
21 claim showing that the pleader is entitled to relief[,] and a demand for judgment.'"). Plaintiff
22 is, of course, mistaken. Federal procedural law, including federal pleading standards,
23 governs in federal court, even where a district court exercises jurisdiction solely on the
24 basis of diversity of citizenship. See *Hanna v. Plumer*, 380 U.S. 460 (1965). Thus,
25 Arizona's pleading standards and Arizona case law elucidating those standards
26 are irrelevant. *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 622 (2009), supply
27 the appropriate standard by which to judge the adequacy of Plaintiff's complaint. Under
28 those cases, "a complaint must contain sufficient factual matter, accepted as true, to 'state

1 a claim to relief that is plausible on its face.”” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*,
 2 550 U.S. at 570). This requires “more than labels and conclusions, and a formulaic
 3 recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

4 Second, Plaintiff argues a statute of limitations argument cannot be raised in a
 5 Rule 12(b)(6) motion. Plaintiff is again mistaken. A time-barred claim may be dismissed
 6 under 12(b)(6) where, as here, the claim’s untimeliness is evident on the face of the
 7 complaint. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954,
 8 969 (9th Cir. 2010).

9 On the merits, Plaintiff contends that Defendant did republish her defamatory
 10 statements, because she “edit[ed] and retransmit[ted] the defamatory material,” and
 11 “plac[ed] it in a new form.” *See Larue v. Brown*, 235 Ariz. 440, 445 (App. 2014).
 12 Specifically, Plaintiff contends that by creating and circulating a Change.org petition in
 13 August 2021, Defendant republished her defamatory statements and, as a result, this
 14 action is timely.² The complaint, however, fails to allege that Defendant altered or
 15 amended the substance of her allegedly defamatory statements in circulating the
 16 petition. And, in Arizona, internet publications are only “republished” for purposes of the
 17 statute of limitations if the substance of the defamatory statements change.³ *See*
 18 *Larue*, 235 Ariz. at 445 (“Mere modifications to the way information is accessed, as
 19 opposed to changes in the nature of the information itself, does not constitute
 20 republication.” (cleaned up)). Nor does the complaint allege a plausible basis for

21
 22 Plaintiff also argues that Defendant republished by (1) changing the top-level domain of
 23 the website on which she defamed him from metoophoenix.com to metoophoenix.org, and
 24 (2) posting links to Twitter and Instagram pages on the website. These claims are without
 25 merit. First, Plaintiff’s complaint does not assert that the linked social media pages either
 26 mention or allude to him. Second, allegations that the social media pages were linked on
 27 metoophoenix.org, and that Defendant changed the website’s top-level domain, even if
 28 accepted as true, do not demonstrate republication. *See Larue*, 235 Ariz. at 445 (“Because
 websites are subject to updates or modifications at any time that can be completely
unrelated to their substantive content, the question of republication in the context of
Internet publication focuses on whether the update or modification affects the substance of
the allegedly defamatory material.”).

³ Plaintiff correctly asserts that while the Change.org petition does not expressly refer to
him by name, he need only be identifiable to have an actionable defamation claim. *See*
Rogers v. Mroz, 252 Ariz. 335, 502 P.3d 986, 990 ¶ 13 (2022). However, that does not
cure the complaint’s other deficiencies.

1 believing Defendant circulated the petition. (Indeed, the complaint says almost nothing at
 2 all regarding the Change.org petition.)

3 Plaintiff next contends the statute of limitations was tolled under A.R.S. § 12-501
 4 because Defendant moved out of Arizona. Plaintiff is again mistaken. Arizona courts
 5 have long held that § 12-501 does not apply to a defendant who is subject to Arizona's
 6 long-arm statute and amenable to service of process. *See Selby v. Karman*, 110 Ariz. 522,
 7 523 (1974) ("[T]he terms 'without the state' and 'absence' as used in [§ 12-501] mean out
 8 of the state in the sense that service of process in any of the methods authorized by rule
 9 or statute cannot be made upon the defendant to secure personal jurisdiction by the trial
 10 court."); *Pina v. Watson*, 115 Ariz. 227, 229 (1977) ("[I]n order to toll the statute of
 11 limitations, a plaintiff at a minimum must be able to show whole days when the defendant
 12 could not be served with process."). Here, Defendant—who owns property in Arizona and
 13 was in fact served in this case—was clearly subject to Arizona's long-arm statute and
 14 amenable to service of process throughout the limitations period. Thus, § 12-501 is
 15 inapplicable and no tolling is warranted.

16 Finally, Plaintiff contends that Defendant's motion should be converted into a
 17 motion for summary judgment, and discovery should be permitted, because Defendant
 18 attaches exhibits to her motion and references factual material outside the complaint.
 19 Plaintiff fails, however, to respond to Defendant's contention that the doctrines of
 20 incorporation by reference and judicial notice permit the Court to consider the
 21 exhibits.⁴ Accordingly, Plaintiff waives his argument in opposition. *See* LRCiv
 22 7.2(i); *E.E.O.C. v. Eagle Produce, L.L.C.*, No. 06-cv-01921-PHX-NVW, 2008 WL
 23 2796407, at *2 (D. Ariz. July 18, 2008) ("Parties must come forward with their points
 24 and authorities in support of or in opposition to a motion.").

25 **III.**

26 Before briefing on Defendant's motion to dismiss concluded, Plaintiff moved to

27
 28 ⁴ *See Davis v. HSBC Bank Nevada*, 691 F.3d 1152, 1160 (9th Cir. 2012) (discussing
 incorporation by reference); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)
 (discussing judicial notice).

1 amend his complaint a second time. Plaintiff seeks leave to join a second defendant,
 2 Jennifer Strickland, on the basis that she allegedly made defamatory statements about
 3 Plaintiff on her Facebook page on March 19, 2021. Plaintiff, however, did not move to
 4 amend until on March 21, 2022, more than a year after the allegedly defamatory
 5 statement was published. (See Doc. 27.) Thus, Plaintiff's claim against Strickland is,
 6 like his claim against Defendant, untimely.

7 **IV.**

8 Plaintiff's complaint suffers from several critical defects, most notably its
 9 complete absence of detail. The complaint contains only six paragraphs of factual
 10 allegations, consisting of just over a single page in length. These conclusory allegations
 11 fall well short of the standard required under the Federal Rules to state a plausible claim
 12 for relief. *See Twombly*, 550 U.S. at 555.

13 The Court has already granted Plaintiff leave to amend once. Yet, despite his
 14 knowledge of Defendant's arguments, including her statute of limitations argument,
 15 Plaintiff failed to cure the defects in his complaint. The Court may dismiss a complaint
 16 with prejudice on such occasions. *See Abagninini v. AMVAC Chem. Corp.*, 545 F.3d 733,
 17 742 (9th Cir. 2008).

18 Additional amendment would also be futile. Plaintiff has failed to identify any
 19 additional facts he could plead to cure the deficiencies in his complaint. *See Gordon v.*
20 City of Oakland, 627 F.3d 1092, 1094 (9th Cir. 2010). And none are evident to the
 21 Court. Equitable tolling does not apply in this case (as Plaintiff's counsel conceded at
 22 oral argument). *See Porter v. Spader*, 225 Ariz. 424, 428 (App. 2010). Nor does the
 23 discovery rule. *See No Worries Rooter, LLC v. Marlin Mech. Corp., Inc.*, No. 1 CA-CV
 24 21-0029, 2022 WL 776442, at *2 (Ariz. Ct. App. Mar. 15, 2022) ("[I]n general, Arizona
 25 courts have not applied the discovery rule in defamation cases."). Thus, additional
 26 amendment would not change that Plaintiff's claims are time-barred. *See Thinket Ink*
27 Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1061 (9th Cir. 2004).

28

V.

Accordingly,

IT IS ORDERED granting Defendant's Motion to Dismiss (Doc. 19) with prejudice.

IT IS FURTHER ORDERED denying Plaintiff's Motion for Leave to Amend (Doc. 27).

IT IS FINALLY ORDERED directing the Clerk of Court to enter judgment for Defendant and to close the case.

Dated this 6th day of May, 2022.

Michael T. Fiburdi

Michael T. Liburdi
United States District Judge